UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
SHAWANO COUNTY,	)	
NATIONAL SERVICE CLEANING CORP.,	)	**Docket No. V-5-CAA-013**
AND	)	
GROW CONSTRUCTION MANAGERS, INC.,	)	
	)	
Respondents	)	

ORDER DENYING MOTION TO STRIKE

AND MOTION IN LIMINE

On August 31, 1995, the Director of Air and Radiation Division of the U.S. Environmental Protection Agency, Region 5, filed a Complaint against the three Respondents named above, pursuant to Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. §7413(d). The Complaint charged the Respondents with violating Section 112 of the CAA and regulations promulgated thereunder, known as the National Emission Standards for Hazardous Air Pollutants (NESHAP), 40 C.F.R. Part 61. Each Respondent filed an Answer to the Complaint, denying liability.

Thereafter, upon Motion granted to amend the Complaint, Complainant submitted an Amended Complaint dated February 18,

1997, reducing the proposed penalty and adding certain allegations. The Respondents are charged in the Amended Complaint with two counts of violating the NESHAP for asbestos, 40 C.F.R. Part 61 Subpart M, during renovation activities at the Shawano County Jail. The Amended Complaint alleges that Respondents failed to adequately wet regulated asbestos containing material (RACM) during an asbestos stripping operation, and failed to ensure that the RACM remains wet until collected and contained or treated in preparation for disposal, in violation of 40 C.F.R. sections 61.145(c)(3) and 61.145(c)(6)(i) respectively. In their Answers to the Amended Complaint, all three Respondents denied liability for the violations charged.

On April 23, 1997, Complainant filed a singular "Motion to Strike and Motion in Limine" requesting that certain defenses be stricken from the Answers of two of the Respondents, Shawano County and National Service Cleaning Corporation (NSCC).[(1)] Respondent NSCC opposed the Motion, and Shawano concurred in the opposition. Complainant moved for leave to file a reply to the opposition, with an attached reply. The Motion for Leave to file a reply was unopposed and is hereby granted.

Specifically, Complainant moved to strike the defenses raised in the last sentence of Defense Number 4, and the whole of Defenses Number 5 and 6, as set forth virtually identically in the Answers of both Shawano County and NSCC. Those defenses in both Answers read as follows:

4. The WDNR [Wisconsin Department of Natural Resources] inspector failed to follow appropriate inspection techniques, including, but not limited to inspection techniques recommended in the Guidance Document at the time of the inspections of the asbestos renovation activity at the Shawano County Jail on September 13, 1994 and September 14, 1994, and the conclusions reached by the WDNR inspector based upon such inspection techniques are erroneous and unreliable. Further, the conclusions reached by the WDNR inspector as a result of his inspections on September 13, 1994 and September 14, 1994, which constitute the sole basis for the Administrative Complaint, are specifically and expressly contradicted by other extrinsic evidence, including, but not limited to the moisture content of samples taken by NSCC of the RACM inspected and the results of air monitoring conducted at the project site. (Emphasis added).

5. At the time of the inspections conducted by the WDNR inspector of the asbestos renovation activity at the Shawano

County Jail on September 13, 1994 and September 14, 1994, NSCC took multiple samples from the same bags from which the WDNR inspector procured his samples at the time of the inspections, and NSCC had the samples tested for moisture content. The two (2) samples taken during the inspection on September 13, 1994 yielded moisture contents of 48.2% and 85.4%, and the two (2) samples taken during the inspection on September 14, 1994 yielded moisture contents of 77.8% and 76.2%. Given the nature of the materials which were inspected by the WDNR inspector during his inspections . . . the moisture content demonstrated by laboratory tests procured by NSCC fully and adequately demonstrate that NSCC was adequately wetting all of the RACM material in question.

6. During the entire course of the asbestos renovation activity engaged in by NSCC at Shawano County Jail, air monitoring was conducted in accordance with the requirements of the regulations promulgated by the Occupational Safety and Health Administration (OSHA). . . . the results of said air monitoring clearly show that the level of asbestos fibers in the immediate work area were all far below the prescribed OSHA action levels, and constitute clear and unequivocal evidence that there were no visible emissions from the asbestos renovation activity conducted by NSCC at the Shawano County Jail and that NSCC was adequately wetting and maintaining as adequately wet all RACM during the course of the asbestos renovation activity.

Complainant argues that those defenses are without merit on the basis that Respondents, by attempting to introduce evidence regarding moisture testing and air monitoring, are attacking the validity of the asbestos NESHAP regulations -- specifically, the regulatory definition of "adequately wet" in 40 C.F.R. § 61.141, which states as follows:

Adequately wet means [to] sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

Complainant points out that in developing the definition during the rulemaking process, EPA considered but rejected a suggestion that EPA use moisture testing and air monitoring to determine whether asbestos-containing material is "adequately wet." The comments and EPA's responses to them were published in a background information document entitled National Emission

Standards for Asbestos- Background Information for Promulgated Asbestos NESHAP Revisions, EPA Air Docket 450/3-90-017 (October 1990) ("Background Document").

Complainant further points out the general principle that "challenges to rulemaking are rarely entertained in an administrative enforcement proceeding." In re American Ecological Recycle Research Corp., RCRA (3008) Appeal No. 83-3 (CJO, July 18, 1985), *quoted in* In re Norma Echevarria and Frank Echevarria, d/b/a Echeco Environmental Services, 5 EAD 626, 634, CAA Appeal No. 94-1 (Final Decision, December 21, 1994). Challenges to any regulation or requirement under Section 112 of the Clean Air Act must be brought within 60 days of promulgation by a suit in the U.S. Court of Appeals for the District of Columbia, according to Section 307(b)(1) of the CAA, 42 U.S.C. 2 7607(b)(1). The Environmental Appeals Board (EAB) in Echevarria declined to review 40 C.F.R. sections 61.145(c)(3) and 61.145(c)(6)(i), which concern the issue of "adequately wet," where those provisions were challenged by the respondent in that case as unconstitutionally vague, ambiguous and without objective and quantifiable standards for measuring compliance. The EAB stated that "review of a regulation will not be entertained absent the most compelling circumstances." 5 EAD at 634.

Finally, Complainant points out that evidence may be excluded from the liability phase of a proceeding if it is presented to challenge the validity of a regulation, citing In re International Harvester Co., 2 EAD 341, 342, CAA Appeal No. 87-1 (Final Decision, March 23, 1987)(evidence regarding technical or economic infeasibility of compliance with 40 C.F.R. Part 120 was excluded from liability phase of proceeding where those regulations were construed as precluding consideration of infeasibility as a defense to liability) *aff'd,* Navistar International Transportation Corp. v. U.S. EPA, 858 F.2d 282, 288-289 (6th Cir. 1988), *cert. denied,* 490 U.S. 1039 (1989). Complainant moves to preclude all Respondents from introducing any evidence in support of defenses 4, 5 and 6 quoted above as to the issue of liability.

Because motions to strike are not addressed in the procedural rules applicable to this administrative proceeding, 40 C.F.R. Part 22, federal court practice following the Federal Rules of Civil Procedure (FRCP) may be looked to for guidance. In general, striking a portion of a pleading is not favored and is considered a drastic remedy. Lunsford v. United States, 570 F.2d 221, 229 (8th Cir. 1977). The general policy is that pleadings

should be treated liberally, and that a party should have the opportunity to support its contentions at trial. Ciminelli v. Cablevision, 583 F. Supp. 144, 162 (E.D.N.Y. 1984); Wohl v. Blair, 50 F.R.D. 89, 91 (S.D.N.Y. 1970). "Courts grant motions to strike a defense 'only if the defense is legally insufficient, and presents no question of law or fact that the court must resolve.'" Nelson v. University of Maine Sys., 914 F.Supp. 643, 647 (D. Maine 1996), *citing,* 2A Moore's Federal Practice ¶ 122.21[3] at 112-210 (1995). The motion may be granted where the court is "convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed." Friends of Santa Fe City v. LAC Minerals, Inc., 892 F.Supp. 1333, 1343 (D. N.M. 1995), *quoting,* Carter-Wallace, Inc. v. Riverton Laboratories, Inc. 47 F.R.D. 366, 368 (S.D.N.Y. 1969).

Respondents Shawano and NSCC have raised questions of fact in defenses numbered 4, 5 and 6 in their Answers. Complainant apparently believes that there are no circumstances under which the defenses could succeed. However, to the contrary, Respondent's defenses, if proven, may affect issues of liability in this proceeding.

Complainant is incorrect in its perception that Respondent's defenses and evidence as to moisture testing and air monitoring are an attack on the validity of the regulations. The asbestos NESHAP regulations, including the definition of "adequately wet," do not preclude any particular method of determining whether asbestos-containing material (ACM) is "adequately wet."

During the rulemaking process, EPA considered whether to include "some means of quantifying the condition of being 'adequately wet,' for example, a moisture measurement method or a method to measure airborne fiber concentrations." (Background Document p. 7-93). Noting that "development of a test method would require the time and resources associated with a research effort," and that the "current approach works," EPA simply chose at that time not to include a measurement method, but left the possibility open if "something better becomes available." (Id.) EPA recommended that a feasibility study be performed for use of air monitoring of fiber concentrations to determine proper wetting procedures (Background Document pp. 7-93 to 7-94). EPA did not rule out any particular methods for determining when ACM is "adequately wet," but merely chose not to specify quantifications under such methods until studies were completed.

Thus, the current definition in 40 C.F.R. § 61.141 sets forth one possible method for determining whether ACM is "adequately wet" -- whether there are any visible emissions. However, EPA has described other methods in a guidance document, Asbestos/NESHAP Adequately Wet Guidance, EPA 340/1-90-019 December 1990) (Complainant's Motion, Exhibit 2). That document states (at pp 21-22) as follows with regard to inspections, in part:

The intent of the following guidelines is to provide GUIDANCE ONLY, to the regulated community regarding the inspection procedures recommended to Asbestos NESHAP inspectors for determining compliance with the "Adequately Wet" requirements of the Asbestos NESHAP. The purpose of the wetting provisions is to require as much wetting as is necessary to prevent airborne emissions of asbestos fibers. . . . The determination of whether RACM . . . has been adequately wetted is generally based on observations made by the inspector at the time of inspection. Observations probative of whether a material is adequately wet include but are not limited to, the following:

* * *

5. Examine a stripped or removed piece of . . . RACM which wets readily. Does it appear to be wetted throughout? If it does not, adequately wet the sample. Describe and photograph how the physical characteristics of the material change upon wetting (e.g., color, weight, texture, etc.). . . .

Although agency guidance documents are not conclusive interpretations of the regulations, it is clear that EPA considers evidence other than the presence of visible emissions to determine whether ACM is adequately wet. "It is the failure to follow the work practice to wet adequately rather than the release of visible emissions which creates liability." United States v. MPM Contractors, Inc. 767 F.Supp. 231, 233 (D. Kan. 1990).

Indeed, the definition of "adequately wet" includes the description, "sufficiently mix[ed] or penetrate[d] with liquid to prevent the release of particulates." 40 C.F.R. § 61.141. There is no reason to assume that measurements of moisture content or airborne fibers are not relevant and probative as to whether ACM meets that description.[(2)] For example, a demonstration that the particular type of ACM with a certain moisture content will not release particulates would appear to be very relevant.

Complainant's position is that evidence of moisture content of the ACM sampled would not disprove the inspector's findings, because the inspector's observations at the site are the determining factor as to whether ACM was "adequately wet."

While such determinations made by inspectors on site are probative evidence of a violation, they are not binding in an administrative proceeding. The EAB stated, "when an inspector

. . . reasonably determines that a violation has occurred and provides a rational basis for that determination, liability should follow, **absent proof that the inspector's testimony lacks credibility.**" Echevarria, 5 EAD at 639-640 (emphasis added). In that case, the respondent's employees did not take the opportunity to observe the EPA's inspection and therefore were unable to refute the inspector's testimony of his observations.

Here, in contrast, Respondents assert that the inspector's observations were inaccurate, based upon improper inspection procedures and other contrary factual evidence.

In other asbestos NESHAP work practice cases, respondent's evidence as to wetness of ACM has been considered. In re D & H Contractors, Inc. and St John's Episcopal Church, Docket No. CAA-III-022 (Initial Decision, February 4, 1997)(Respondent's testimony as to a hose to supply water to the area, wetting procedures, and visual observations considered). Respondents have successfully refuted an inspector's testimony as to asbestos work practices. In re L & C Services, Inc., Docket No. VII-93-CAA-112 (Initial Decision, January 29, 1997)(Evidence of failure to clean sampling knife between taking samples indicated samples were not reliable).

Therefore, evidence which is relevant to whether the ACM at issue was "sufficiently mix[ed] or penetrate[d] with liquid," and which is not "immaterial, unduly repetitious, or otherwise unreliable or of little probative value" may be admitted in this proceeding, in accordance with the standard for admitting evidence under the Consolidated Rules of Practice, 40 C.F.R. § 22.22(a).

In sum, Complainant has not shown that Defenses 5 and 6 and the last sentence of Defense number 4 should be stricken or that any evidence in support of those defenses should be excluded from the liability phase of this proceeding.

Accordingly, Complainant's Motion to Strike and Motion in Limine are DENIED.

So ordered.

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Susan L. Biro

Chief Administrative Law Judge

Dated: [June 9, 1997]

Washington D.C.

1. "Answer" or "Answers" will refer to Answers to the Amended Complaint. The defenses that are the subject of the Motion to Strike and Motion in Limine were also raised in the original answers of NSCC and Shawano to the original Complaint.

2. Complainant's argument that it would be an unfair burden on EPA to use limited Agency resources to procure the services of an air monitoring expert to rebut air monitoring evidence is unsupported and thus rejected.